

EXHIBIT

95

COMMODITY FUTURES TRADING COMMISSION

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IN THE MATTER OF:

RETAIL FOREX FRAUD

-----X

140 Broadway

New York, New York

May 25, 2016

9:39 A.M.

DEPOSITION of DREW NIV, the witness
herein, taken by the Commodity Futures Trading
Commission, pursuant to Agreement, held at the
above-noted time and place, before a Notary Public
of the State of New York.

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1 Drew Niv

2 sixteen providers as the sole market maker, and we
3 roll back all the non-dealing desk clients back to
4 dealing desk, or the second scenario, where he
5 stayed at FXCM and we roll back some clients to a
6 dealing desk.

7 Q So there was no -- let me ask you this.
8 During the time that he was live testing, as an
9 employee of FXCM, testing out this system that
10 would ultimately be used at Effex, at that point
11 he was one of a number of liquidity providers
12 streaming prices?

13 A Yes. So we would have to match the best
14 bid/offer or beat the best bid at the time there
15 was a need to beat the best bid/offer.

16 Q Was there any discussion of maintaining
17 that setup where he, Mr. Dittami, from within
18 FXCM, would continue to compete with other outside
19 liquidity providers?

20 A We came to the -- compliance and legal
21 came to the conclusion that we could not do it
22 from inside FXCM and continue to call a no-dealing
23 desk a no-dealing desk because he would constitute
24 an algorithmic desk, and it was not holding the
25 trades like a traditional dealing desk, and it was

1 Drew Niv

2 not the same attributes of a traditional dealing
3 desk, that it would not -- that it is too blurry,
4 and essentially would be better if it was a
5 separate company.

6 And we could not, if we did internalize
7 him, we could not call it a non-dealing desk, we
8 would have to call it a dealing desk.

9 Q What were the traditional aspects of a
10 dealing desk that Mr. Dittami's venture would not
11 have?

12 A A dealing desk really has three big
13 things, and these are retail FX-specific
14 terminology so different terminology than in other
15 instruments. But as this is industry standard
16 typical dealing desk, essentially three things
17 that determine it and these are three central
18 elements. One, it decides what price the customer
19 sees, so it decides on the feed and what bid and
20 offer is displayed to the customer.

21 Again the traditional dealing desk also
22 has all the pre-trade information of the customer,
23 so it knows that if you are a customer, that you
24 are long Euro right now, so if you are -- and that
25 you are close to a bid getting stopped, if the

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1 Drew Niv

2 informed FXCM that he was going to be forming
3 Effex Capital as his own company?

4 A Yes, so as I said, I don't remember the
5 exact dates, but if you are saying April -- some
6 day he resigned in April, then the decision to
7 have him resign and start Effex is made long
8 before that.

9 Q So in effect, FXCM was allowing Mr.
10 Dittami while he was FXCM's employee to carry out
11 tests for this new company that he was starting,
12 Effex; is that right?

13 A Yes.

14 Q Were there any discussions regarding any
15 compliance or legal issues with him doing these
16 test trades for Effex while he was an FXCM
17 employee?

18 A I do not recall the specifics, but
19 clearly we definitely had the compliance
20 discussion that he could not be a market maker and
21 be an FXCM employee at the same time, while we
22 continue to say no dealing desk. There was no
23 intent to violate, you know, that. I think that,
24 you know, like I said, we had what we perceived to
25 be a gap in the customer experience that was

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D r e w N i v

2 A I don't recall weighing this as an
3 independent issue. I recall that we are talking
4 about such a negligible amount of trades. Half a
5 million trades a day, not anywhere even close to
6 those numbers, and done purely for proving out the
7 fact of the thesis we were trying to test. The
8 excuses that are given to us by banks about this
9 order flow is not as good and the price cannot be
10 tightened and hold times cannot be improved, and
11 that theory is wrong and could be improved.
12 That's what we set out to prove and I think if you
13 look over the last five years it proved to be very
14 much the case.

15 Q My question as to whether you thought
16 this test trading was consistent with the no
17 dealing desk representation we just talked about,
18 you don't recall having a view one way or the
19 other, or you don't recall having -- you don't
20 recall whether your view was one thing or another
21 or you don't think that you had thought about it
22 to have a view at all at the time?

23 A I did not pay attention to it, did not
24 think about it at all.

25 Q And sitting here today, do you believe

1 Drew Niv

2 that it was consistent with the representations?

3 A I think it's negligible, immaterial
4 amount, you know, specifically, not just by number
5 of trades, by notional values involved, you know,
6 amount of money back and forth.

7 Q You don't recall any discussions about
8 this issue at the time?

9 A No.

10 Q If the test trading had continued in
11 larger volumes with Mr. Dittami's still at FXCM,
12 would it still be consistent with, in your view,
13 with the representations?

14 A Define larger -- if it became consistent
15 and material and he was acting as a market maker,
16 yes, he would not have the equipment and the staff
17 to do that.

18 Q To make sure I got your answer right, if
19 it had continued in larger volume such that he had
20 the same volume as one of your other market
21 makers, you think it would be consistent or it
22 would not be consistent?

23 A It would not be consistent.

24 BY MR. TOMER:

25 Q Just a quick question on these meetings

1 Drew Niv

2 number that is --

3 Q A guess?

4 A A guess. Not an unintelligent guess,
5 but a number that's very quickly subject to change
6 without control by the people making the guess.

7 Q And did you have an understanding that
8 if the number of Mr. Ditammi's Effex's revenue per
9 million changed then the amount of fees under
10 section 3.1 would have to be adjusted?

11 A Yeah, we told them, you know, that
12 essentially as happened in history, as time went
13 on, competition got fiercer, exactly what we
14 wanted to happen happened. Spreads got about
15 ninety percent tighter than they were when we
16 first started. Competition got much more intense;
17 therefore dollars per million for market makers
18 declined, including for himself. That number got
19 lower because he could not afford to give us --
20 couldn't pass \$21. It is that issue I think is,
21 we told him because of this, variability, we would
22 be flexible, but we need a set contract rate.
23 Again to make payment for order flow arrangements
24 for equity brokers we wanted to template the same
25 way.

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1 Drew Niv

2 Q Was the amount of \$21 per million
3 intended to reflect a previously negotiated split
4 of 70 percent for FXCM and 30 percent for Mr.
5 Dittami?

6 A I think that it was definitely reflected
7 intent to reflect the fact that, just like in
8 other arrangements, we would get, you know, a
9 bigger share of the benefit than he would get.

10 Q Right.

11 A The percentage is kind of up in the air
12 because there's other issues, there's other costs,
13 other risks. Any other things.

14 Q I guess my question is, do you have any
15 recollection of whether the negotiation over the
16 amount of the fee coming out to \$21 per million
17 was essentially settled by reference to the 70/30
18 split that had already been agreed to in
19 connection with Mr. Dittami's employment agreement
20 together with an estimate of what Effex's P&L was
21 going to be per million?

22 A It was a much wilder guess than that. I
23 think William handled negotiations, I did not
24 handle negotiations. It was a guesstimate from
25 the get-go. To say the word scientific with this,

1 Drew Niv

2 even within the same institution. Different bonus
3 plans, everything, same interest because it was
4 the same bank.

5 It was outrageously difficult to do. We
6 shopped around a lot. It was very important to us
7 to do all these things and, you know, part of --
8 you know, this whole discussion about employment
9 by John Dittami, Effex, turning back to the
10 dealing desk, discussion around frustrations in
11 not being able to essentially cure what we are
12 trying to cure, which is this customer issue.

13 BY MR. ROMEU-MATTA:

14 Q You mentioned that there were other
15 payments for order flow with liquidity providers?

16 A Yes.

17 Q Do you recall which ones?

18 A Goldman Sachs and BNP.

19 Q Any others?

20 A I don't recall.

21 Q Do you remember an approximate date for
22 the payment with Goldman Sachs?

23 A I don't know.

24 Q Was it between 2008 and 2013?

25 A Yes.

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Q H o w a b o u t B N P ?

A A r o u n d t h e s a m e .

Q It would have been within those dates?

A W i t h i n t h o s e d a t e s .

MR. ROMEU-MATTA: Thank you.

BY MR. NEWMAN:

Q To your recollection, it would have been Goldman Sachs and BNP were paying you for order flow at the same time that these service agreements are being signed with Effex Capital?

A I do not recall exact dates. Some may have been before. BNP was for a longer period of time so it may have overlapped, I'm pretty sure it overlapped with Effex on certain subsets of customers.

Q Y e s .

A I'm more certain there. I'm not sure of dates, but more certain it overlapped. Goldman I'm not certain because it was a shorter period of time.

Q Just to be clear, we are talking about payment for order flow with respect to your retail customers and to the no-dealing desk model.

A There was also on the institutional

D r e w N i v

side, I think BNP was mostly on the institutional side. I don't recall if we had a retail one too, but it was mostly institutional.

Q So payment for order flow would have been, BNP may not have included the retail side?

A I don't recall exactly.

Q Okay, what about Goldman Sachs, did that --

A T h a t w a s r e t a i l .

Q That was retail? You said that was a short period of time?

A Yes, they reneged two months in or three months into it, one of the most pathetic things I have ever seen.

Q Do you think that was before 2010?

A It was before.

Q Do you know, just out of curiosity, do you know what the amount of the payments were per million, if that's the way it was calculated?

A I don't recall.

Q Was it substantially more than \$21 per million?

A I don't know. I just have no recollection of it.

1 Drew Niv

2 Q So you don't know whether it could have
3 been more or less, you wouldn't guess.

4 A Like in the history of FXCM it was a
5 joke. Not considered a real business, one of
6 those war stories you tell. This is funny. As in
7 this was serious. It was meant to be serious, and
8 we actually --

9 Q You were serious about it?

10 A We were very serious, and for a while we
11 did have and we did honor very substantially an
12 agreement where they got an advantage. And this
13 was for a decent period of time. I know it was
14 through '08. I don't recall when it started and
15 when this ended, but I recall it was shortly after
16 the financial crisis, sometime in '09 that ended.
17 So they did perform well there but they just, you
18 know, they had turnover and staff turned over and
19 new staff said no.

20 Q Did FXCM have a general interest in the
21 profitability of Effex's business?

22 A We had a general interest in
23 profitability as it relates to him paying us the
24 loan and as it related to him being vibrant, being
25 able to expand and hire people, and be a viable

1 Drew Niv

2 part of discussions at this particular point?

3 A It was in the same discussion with all
4 the people. I don't recall every conversation
5 with everybody in the room but everybody was privy
6 to these things.

7 Q Do you know if there were any documents
8 or any e-mails or memos or anything discussing
9 that particular point about giving up the upside
10 from other business that Dittami might get into.

11 A I don't recall from that time.

12 Q There might be but you don't know one
13 way or the other?

14 A No.

15 Q There was an understanding, I think, as
16 you testified a few minutes ago, that the payment
17 for order flow paid by Effex to FXCM would be
18 adjusted under certain circumstances, right?

19 A Right.

20 Q And one of those circumstances would be
21 if Effex's P&L per million of order flow changed.
22 Is that right?

23 A Correct, if our conditions were impacted
24 or competition impacted, that it wouldn't justify
25 paying that.

1 Drew Niv

2 because of competition, and market conditions
3 changed dramatically, which obviously did happen
4 over the years.

5 Q That would be related to his P&L per
6 million, right, the change in competition or
7 market conditions?

8 A Yes.

9 Q Is there anything besides a change in
10 his P&L per million that you contemplated could
11 cause an adjustment in the payments for order
12 flow?

13 A Not that I recall.

14 Q As far as you can recall, were there any
15 discussions within FXCM including with the
16 compliance department about this arrangement of
17 setting the payment for order flow at \$21 per
18 million with the idea of adjusting it if Effex's
19 P&L went up or down?

20 A Compliance was involved in obviously
21 all, essentially we were trying to mimic what
22 happened, you know, in other arrangements in
23 equities where there were standards already set
24 for this, and obviously as in equities, as for
25 example, options used to have lots of payment for

1 Drew Niv

2 money way before 2016 -- John, Effex was worth.

3 Q Right. Going kind of line by line
4 through the agreement, the first whereas clause
5 says Dittami is the sole member of Effex Capital,
6 that's as of this date April 14, 2010, that's true
7 as far as you know?

8 A As far as I know.

9 Q Is he still, by the way, the sole member
10 of the company?

11 A I have no idea.

12 Q The second clause says FXCM has loaned
13 to Effex the sum of \$2 million, and then it makes
14 reference to a secured promissory note, on terms
15 more favorable than Dittami would have obtained in
16 an arms length transaction.

17 Putting aside this reference to a
18 secured promissory note, was it the case that FXCM
19 loaned to Effex \$2 million around this time in
20 April 2010?

21 A Around this time it loaned him
22 \$2 million.

23 Q Is it the case that the loan was on
24 terms more favorable than Mr. Dittami would have
25 obtained in an arms length transaction?

Drew Niv

A Y e s .

Q Is it the case that there was no interest on the loan?

A I don't recall the specifics but I know there was -- as a new business he would have to pay high interest and we did not charge him high interest.

Q Got it. The next sentence says,

"Whereas FXCM has agreed to license to Effex certain intellectual property," then it makes reference to a license agreement, "on terms more favorable than Dittami would have obtained in an arms length transaction."

Putting aside the reference to a license agreement, do you agree that the employment agreement between FXCM and Mr. Dittami contemplated that intellectual property could be licensed from FXCM to Mr. Dittami?

A It said so, yes.

Q Did in fact FXCM agree to let Effex make use of intellectual property Mr. Dittami had developed while he was at FXCM?

A C o r r e c t .

Q The next clause says "Mr. Dittami will

1 Drew Niv

2 economic benefit derived only from us, he is not
3 going to let us do that in the future once he has
4 his business up and running. That is, for
5 example, we tried to negotiate in return for
6 helping the Lucid founder start Lucid, you know,
7 an agreement, we agreed not to and broke off, and
8 ended up paying \$180 million for half the business
9 four years later.

10 BY MR. TOMER:

11 Q Did you ever contemplate buying Effex?

12 A Yes. As I said before, we contemplated
13 for the next two years buying Effex. That was
14 definitely an agenda item that was there. That
15 discussion ended at or around the time that we
16 decided to buy Lucid.

17 Q Prior to buying Lucid, I mean, did you
18 have conversations with Mr. Dittami about buying
19 Effex?

20 A Yes.

21 Q What happened?

22 A Because now, same as discussions before
23 when he was employed, there's buying Effex would
24 have meant switching -- compliance and legal
25 essentially opined that buying Effex essentially

1 Drew Niv

2 means we are not going to say no dealing desk
3 anymore to our clients. That is obviously -- not
4 that compliance said no, compliance said you can't
5 have both. Sales and marketing said we'd rather
6 have NDD for the core business rather than making
7 money -- rather than have this extra-institutional
8 business.

9 Q So I guess, is it fair to say that the
10 non-dealing desk model was more profitable to FXCM
11 than the contemplated profits from purchasing
12 Effex?

13 A It was more profitable and more
14 attractive, yes.

15 Q And Lucid, on the other hand, did not
16 have that problem because you get the upside from
17 Effex but none of the negative issues surrounding
18 that, or disclosure issues?

19 A Correct, because they had no retail
20 relationships, their scale did not depend on an
21 FXCM relationship.

22 Q Did you ever put a bid in for Effex?

23 A We definitely negotiated. Contemplated
24 doing it. We never went and said how much it
25 would be.

1 Drew Niv

2 interest. A dealing desk broker which acts as a
3 market maker may be trading against your
4 position."

5 In this case, the broker being
6 referenced here is an entity like FXCM, correct?

7 A Yes.

8 Q And the trader is the customer?

9 A Correct.

10 Q In Effex's business of providing
11 liquidity to FXCM, Effex is taking the opposite
12 side of a trade, opposite a customer; is that
13 right?

14 A It is correct, yes.

15 Q They have the potential to benefit from
16 customer losses?

17 A Well, like I said, strictly from a
18 dealing desk definition. They don't because they
19 don't hold the risk, but there is theoretical
20 possibility.

21 Q Specifically with regard to these
22 representations that we've just gone over or
23 representations like them, is there any concern at
24 FXCM about whether the existence of the option
25 agreement that we looked at before was consistent

1 Drew Niv

2 A Yes.

3 Q And is that referring to the same
4 concept in the statements made on your website?

5 A Correct. It refers to the customer's
6 profits.

7 Q Your liquidity providers, as opposed to
8 how FXCM makes its profits on trades, your
9 liquidity providers generate revenue based on P&L,
10 correct?

11 A Correct, as they do every other market
12 segment, every instrument.

13 Q So your liquidity providers generally
14 revenue is based at least in part on the positions
15 that they are taking for some period of time
16 opposite customers?

17 A If they do that, yes.

18 Q The beginning of the next paragraph
19 says --

20 BY MR. TOMER:

21 Q When you say if they do that, what did
22 you mean?

23 A Some people hold positions and hold
24 inventories and make money on that inventory; some
25 people just match buyers and sellers. Most

CERTIFICATION

I, NANCY ANNE FLYNN, Registered Professional Reporter and a Notary Public in and for the State of New York, certify;

That the foregoing proceedings were taken before me at the time and place therein set forth, at which time the witness was put under oath by me;

That the testimony of the witness, the questions propounded, and all objections and statements made at the time of the examination were recorded stenographically by me and were thereafter transcribed;

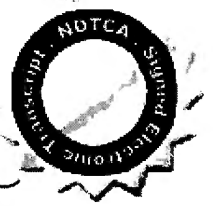
That the foregoing is a true and correct transcript of my shorthand notes so taken.

I further certify that I am not a relative or employee of any attorney of the parties, nor financially interested in the action.

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 8th day of June 2016.

NANCY ANNE FLYNN, RPR



COMMODITY FUTURES TRADING COMMISSION

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IN THE MATTER OF:

RETAIL FOREX FRAUD

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140 Broadway

New York, New York

May 26, 2016

9:42 a.m.

Continued Examination of DREW NIV,
held at the above-noted time and place, before
a Notary Public of the State of New York.

1 Niv

2 this reported to you from other liquidity
3 providers?

4 A. Yes, we did for specific trades
5 or specific days, especially if there was --
6 not regularly but we would get them if things
7 are going well, not going well, we lost money
8 today, you know, so there was definitely --
9 would get those.

10 Q. I see. A liquidity provider
11 might tell you their P&L from trading on a
12 particular day but not on a weekly basis?

13 A. One of these transparent updates,
14 the Deutsche Banks of the world obviously did
15 not send those to other people, but we would
16 get, you know, our trading with you is very
17 profitable, not very profitable, there's room
18 to move, not room to move, those things.

19 Q. Are there particular liquidity
20 providers that you can think of that would
21 provide their P&L to you?

22 A. Again, in this format of this
23 update, nobody did that.

24 Q. Okay. Separate from getting
25 these updates, which I take it would come as a

1 Niv

2 A. Clarifies that we do not own
3 Effex Capital. You know, clarifies that Effex
4 is one of our price providers; that we own
5 Lucid.

6 Q. The idea that Effex can choose
7 whether to take any FXCM trade or pass it on
8 to normal liquidity providers, is that
9 accurate or not?

10 A. Effex has the ability to match
11 best bid offer -- match or beat. Was required
12 in the first few years to beat. Obviously
13 later it was required to match with larger
14 liquidity. That is a first look, not a last
15 look. He's using the wrong information. That
16 is, you know, what a -- very similar to what a
17 designated market maker on exchanges that have
18 that or specialist has those advantages too,
19 and Effex has some of the same and even more
20 burdensome requirements than a specialist
21 requirement.

22 Q. Is there any reason for the
23 response here not to include that explanation
24 of the advantages that you just mentioned?

25 A. You know, I think a lot of this

C E R T I F I C A T E

STATE OF NEW YORK)

) ss.:

COUNTY OF NASSAU)

I, ERIKA GUNTHER, RPR, a Notary Public within and for the State of New York, do hereby certify:

That DREW NIV, the witness whose deposition is hereinbefore set forth, was duly sworn by me and that such deposition is a true record of the testimony given by such witness.

I further certify that I am not related to any of the parties to this action by blood or marriage; and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 9th day of June, 2016.

ERIKA GUNTHER, RPR